

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 23-10063-SHL

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5 In the Matter of:

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7 GENESIS GLOBAL HOLDCO, LLC,

8

9 Debtor.

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12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 April 26, 2023

17 2:10 PM

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21 B E F O R E :

22 HON SEAN H. LANE

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: ART

1 HEARING re Omnibus Hearing

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3 HEARING re Doc. #248 Notice of Agenda

4

5 HEARING re Doc. #218 Motion To Extend Time To File Notices

6 Of Removal Of Related Proceedings

7

8 HEARING re Doc. \$165 Motion For Relief From The Automatic

9 Stay To The Extent Applicable, To Allow For Advancements And

10 Payments Under D&O Insurance Policy

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 CLEARY GOTTlieb STEEN & HAMILTON LLP

4 Attorneys for the Debtor

5 One Liberty Plaza

6 New York, NY 10006

7

8 BY: JANE VANLARE

9 RICHARD CHESTER MINOTT

10 LUKE A. BAREFOOT

11

12 WHITE & CASE LLP

13 Attorneys Official Committee of Unsecured Creditors

14 1221 Avenue of the Americas

15 New York, NY 10020

16

17 BY: PHILIP ABELSON

18

19 ARNOLD PORTER KAYE SCHOLER LLP

20 Attorneys for Soichiro "Michael" Moro

21 250 West 55th Street

22 New York, NY 10019

23

24 BY: BENJAMIN MINTZ

25

1 PROSKAUER ROSE LLP

2 Attorneys for Ad Hoc Group of Genesis Customers

3 Eleven Times Square

4 New York, NY 10036

5

6 BY: JORDAN SAZANT

7

8 ALSO PRESENT TELEPHONICALLY:

9 PAUL ARONZON

10 MARCUS ASNER

11 ERIC IAN ASQUITH

12 SABRINA BREMER

13 BIANCA CASTRO

14 ERIC C. DAUCHER

15 MICHAEL S. ETKIN

16 ANSON B. FRELINGHUYSEN

17 ELLA GASPAR

18 BRIAN D. GLUECKSTEIN

19 AUTUMN HIGHSMITH

20 JUSTIN IMPERATO

21 VINCENT INDELICATO

22 HOO RI KIM

23 TUKISHA KNOX

24 JESSICA LIOU

25 XIU LIU

1 MI LIU  
2 LEAN LIU  
3 KEN LUKASZEWSKI  
4 JEFFREY S. MARGOLIN  
5 JACK MASSEY  
6 KYLE MCKUHEN  
7 MARCY J. MCLAUGHLIN SMITH  
8 MICHELE J. MEISES  
9 LAYLA MILLIGAN  
10 SEAN A. O'NEAL  
11 AMANDA PARRA CRISTE  
12 GREGORY F. PESCE  
13 CHRISTIAN RIBEIRO  
14 BRIAN ROSEN  
15 JEFFREY SAFERSTEIN  
16 JORDAN SAZANT  
17 J. CHRISTOPHER SHORE  
18 GORDON SUN  
19 NACIF TAOUSSE  
20 FRANCISCO VAZQUEZ  
21 MEGAN VOLIN  
22 MICHAEL WEINBERG  
23 COLIN WEST  
24 ARIAM ASMEROM  
25 ERIC IAN ASQUITH

1 BRENDON BARNWELL  
2 BRIANNA B. BILTER  
3 KEVIN EDWARD BROWN  
4 BRIAN BULTHUIS  
5 DONALD BURKE  
6 BRIAN CHANCEY  
7 STEVEN CHURCH  
8 TOM CONHEENEY  
9 COURTENAY CULLEN  
10 JARED DERMONT  
11 MICHAEL DIYANNI  
12 JUSTIN J. DICLEMENTE  
13 LEIA DORAN  
14 LISA FAUCHER  
15 DAN FORMAN  
16 SHUBHANKAR GAHLOT  
17 ASHLYN GALLAGHER  
18 SHAWN GILHOOLEY  
19 UDAY GORREPATI  
20 JASON GOTTLIEB  
21 BRANDON HAMMER  
22 MIRA HAQQANI  
23 TAYLOR HARRISON  
24 MIRANDA HATCH  
25 DENNIS HILKENS

1 DERAR ISLIM  
2 ZUL JAMAL  
3 BARRY JASON  
4 KEEFE JOHNSON  
5 PAUL KINEALY  
6 BARAK KLEIN  
7 DIETRICH KNAUTH  
8 OXANA KOZLOIV  
9 GLEN KRATOCHVIL  
10 KONRAD LAESSER  
11 CHRISTINE LEE  
12 MIKE LEGGE  
13 MICHAEL LETO  
14 SAMUEL LEVANDER  
15 DAVID LOPEZ  
16 ALEXANDRA LOTTY  
17 PETER MAERKL  
18 AKIKOK MATSUDA  
19 JOHN MAYO  
20 ANAIS MITRA  
21 JOHN NGUYEN  
22 TYLER OKADA  
23 REBEKAH PRESLEY  
24 ARIANNA PRETTO-SAKMANN  
25 GREGORY RAAB

1 CHRISTIAN RANDLE  
2 MOHIT RATHI  
3 ANDRES FELIPE SAENZ  
4 SAMIRA SARAN  
5 THERESE SCHEUER  
6 JOE SCIAMETTA  
7 MARK STANCIL  
8 BENJAMIN STEEL  
9 ANDREW SULLIVAN  
10 VINCE SULLIVAN  
11 ANDREW SWIFT  
12 NICHOLAS TALIAN  
13 BRIAN TICHENOR  
14 ANDREW TSANG  
15 WILLIAM MATTHEW UPTEGROVE  
16 ROBB WARE  
17 JACK WESTNER  
18 PAUL WIRTZ  
19 CHAD R. WOLFE  
20 SARAH WYNN  
21 SELA BROWN  
22 JASON GOTTLIEB  
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1 P R O C E E D I N G S

2 THE COURT: All right, good afternoon. Can you  
3 hear me now?

4 MS. VANLARE: Yes, we can.

5 THE COURT: All right, great. Thank you. So this  
6 is Judge Sean Lane in the United States Bankruptcy Court for  
7 the Southern District of New York. And we're here for a two  
8 o'clock hearing in Genesis Global Holdco LLC, a jointly  
9 administered Chapter 11. There's an agenda that was filed  
10 on the docket. And so we'll start, as you always do, with  
11 appearances. So, starting with the debtors.

12 MS. VANLARE: Good afternoon, Your Honor, Jane  
13 Vanlare, Cleary Gottlieb Steen and Hamilton. I'm joined  
14 today by my partner, Luke Barefoot. He'll be handling the  
15 D&O Insurance motion and our colleague, Richard Minott.

16 THE COURT: All right. Good afternoon. And on  
17 behalf of the official committee?

18 MR. ABELSON: Good afternoon, Your Honor, Phil  
19 Abelson, White and Case on behalf of the unsecured creditors  
20 committee. I'm joined by my colleague, Michele Meises.

21 THE COURT: All right. Good afternoon. I think I  
22 do see the declarant in support of motion who's here, Marcus  
23 Asner. So let me get that appearance.

24 MR. MINTZ: Good afternoon, Your Honor. This is  
25 Benjamin Mintz from Arnold and Porter. I'm here with Marcus

1 Asner From Arnold and Porter as well on behalf of the  
2 movant.

3 THE COURT: All right. Good to have you here.  
4 Any other appearances for today's proceeding?

5 MR. SAZANT: Good afternoon, Your Honor. This is  
6 Jordan Sazant, Proskauer Rose, on behalf of the ad hoc group  
7 of Genesis creditors.

8 THE COURT: All right. Good afternoon to you.  
9 Anyone else? All right. So let's, in the first instance,  
10 turn it over to the debtors to walk through the uncontested  
11 matter in the agenda -- on the agenda and any other status  
12 matters before we turn to the contested matter.

13 MS. VANLARE: Thank you very much, Your Honor.  
14 I'm going to turn it over to my colleague Richard Minott who  
15 will be presenting the removal extension motion.

16 THE COURT: All right, happy to hear from him.  
17 Counsel.

18 MR. MINOTT: Good afternoon, Your Honor. For the  
19 record, Richard Minott of Cleary Gottlieb, counsel for the  
20 debtors. The first item on the agenda is the debtor's  
21 motion for an order extending the time within which to file  
22 notices of removal of civil actions and proceedings. The  
23 motion was filed at Docket Number 218. And is at Tab 1 of  
24 Your Honor's binder.

25 THE COURT: I have it.

1 MR. MINOTT: Great. Your Honor, pursuant to  
2 Bankruptcy Rule 9027, the deadline for the debtors to file  
3 notices of removal for civil actions and proceedings that  
4 have been pending as of the petition date was April 19th  
5 with such deadline being automatically extended pursuant to  
6 the bridge order provisions of the local rules by the filing  
7 of the removal extension motion. Your Honor, by this  
8 motion, the debtors seek to extend the removal deadline for  
9 all debtors until the date and order is entered confirming a  
10 Chapter 11 plan in these cases.

11 As set forth in the motion, the debtors  
12 respectfully submit that cause exists to extend the removal  
13 period. During the first 90 days of these cases, the  
14 debtors and their professionals have devoted significant  
15 resources and efforts to preserve and maximize the value of  
16 the debtors' estates. As a result, and given the debtors  
17 focus on laying the initial groundwork for these cases, the  
18 debtors require additional time to fully examine pending  
19 civil actions to determine the feasibility or benefit of  
20 removing each case, which efforts are underway.

21 Your Honor, no responses or objections were filed  
22 by the response deadline. As such, the motion is moving  
23 forward in an uncontested basis. So unless Your Honor has  
24 any questions, we respectfully request the order attached to  
25 the motion as Exhibit A be entered.

1 THE COURT: All right. Thank you very much. Any  
2 party that wishes to be heard on the debtors' motion?

3 All right, hearing no response and seeing no  
4 objection on the record, I'm happy to grant the request of  
5 relief for all the reasons that you set forth in your motion  
6 as appropriate under the facts and circumstances of the case  
7 and applicable law. Thank you very much.

8 MR. MINOTT: Thank you, Your Honor. I'll now turn  
9 the podium over to Mr. Barefoot.

10 THE COURT: All right. Mr. Barefoot.

11 MR. BAREFOOT: Your Honor, Luke Barefoot for the  
12 debtors. It's Mr. Mintz' motion.

13 THE COURT: All right, we'll turn it over to Mr.  
14 Mintz.

15 MR. MINTZ: Thank you, Your Honor. I want to  
16 start just with a brief procedural background and then I'll  
17 get into the facts and the argument underlying our motion.

18 By way of background, we filed the motion for stay  
19 relief on behalf of Michael Moro on March 27th, 2023.

20 That's at Docket Number 165. Pursuant to that motion, we  
21 seek stay relief to allow Mr. Moro to enforce his rights  
22 under the D&O policy and demand and receive proceeds under  
23 the policy and allow the insurer to advance such amounts to  
24 Mr. Moro.

25 The debtors filed a response at Docket Number 234.

1 The debtors do not oppose the motion and, instead, take the  
2 position that if the Court were to grant the motion, the  
3 motion should be modified to extend to all insureds, all  
4 individual insureds and to extend to all insurance policies  
5 including the excess policies.

6 On behalf of the movant, we don't have an issue  
7 with those modifications in connection with our own motion.

8 The creditors committee filed an objection to the  
9 motion. That's at Docket Number 235. And on behalf of Mr.  
10 Moro, we filed a reply in support of the motion at Docket  
11 Number 249 and we also filed the supporting declaration from  
12 my partner Marcus Asner, who's on the line here today, at  
13 Docket Number 250. No other objections or responses were  
14 filed in respect to the motion.

15 MR. ABELSON: Your Honor -- my apologies, Mr.  
16 Mintz. Can we take up the issue of the declaration or do  
17 you want to wait for that because we do have some  
18 objections?

19 THE COURT: All right. I'm going to let Mr. Mintz  
20 present and then we'll get to the objections, both to the  
21 motion and the declaration. Thank you.

22 MR. ABELSON: Fair enough. Thank you.

23 MR. MINTZ: I think, I mean I'm prepared to deal  
24 with the declaration, but I'll start with the fact as  
25 follows, which is, I think the principal relevant facts

1 relating to the motion are not in dispute and they're not  
2 controverted and there are no material issues of dispute in  
3 that regard. It's not disputed that Mr. Moro was the former  
4 chief executive officer of the debtor, Genesis Capital, from  
5 2018 to 2022. And prior to that, he was the chief operating  
6 officer and then chief executive officer of Genesis Global  
7 Trading. That's not a disputed fact. It's also not  
8 disputed that the debtors maintain a D&O policy, the subject  
9 of the motion, an E&O policy, an excess policy. And each of  
10 those policies have limits that are specified therein, most  
11 particularly the D&O policy has a \$2.5 million coverage  
12 limit.

13 The terms of the policy are not in dispute either.  
14 They're pretty clear and there isn't really any ambiguity or  
15 anything that people are arguing about as to the provisions  
16 of the policy. The D&O policy provides for three buckets of  
17 coverage. There's a Side A, which covers losses of the  
18 insured individuals. That's the directors and officers to  
19 the extent that they're not indemnified by the company. And  
20 as an aside, and this is not disputed either, Mr. Moro has  
21 requested indemnification from the company and the debtors  
22 have declined that request. Side B of the policy covers  
23 losses of the insured company in respect of the company's  
24 payment of indemnification claims on behalf of insured  
25 individuals. And Side C covers losses of the insured

1 company in respect of a securities claim.

2 It's also not disputed that the policy includes a  
3 payment priority provision and that provision is in favor of  
4 the Side A coverage and it provides that if total loss  
5 exceeds the applicable coverage limit, the insurer will  
6 first pay loss covered under Side A before any other covered  
7 amounts under the policy.

8 And it's also not disputed that the debtors are  
9 the subject of several governmental investigations at a  
10 federal and state level. The committee made some objection  
11 to the fact that we didn't detail out those investigations.  
12 I don't think it's appropriate to disclose the details of  
13 those investigations. And I imagine the debtors are not  
14 interested in getting into those details on the record. I  
15 think if it, if it's really an issue, we would be prepared  
16 to describe the details of those investigations in-camera  
17 and not on the public record. But I really don't think  
18 there's any serious dispute that there are multiple  
19 governmental investigations that are ongoing involving the  
20 debtor.

21 Mr. Moro, this is also not disputed, Mr. Moro has  
22 been cooperating with information requests from the debtors  
23 relating to those governmental investigations. And he's  
24 also been responding and cooperating with the governmental  
25 entities as well. He's incurred legal expenses,

1 particularly the fees of expenses of Arnold and Porter in  
2 connection with those investigations and his efforts to  
3 cooperate. And those expenses are covered under Side A the  
4 policy.

5 So let me focus on our argument. Courts in this  
6 district faced with these types of requests have generally  
7 afforded the directors and officers relief of the type  
8 requested here. We cite several examples of that. There's  
9 MF Global, Adelphia and Enron. And the relief is usually  
10 noncontroversial and is often stipulated to by the debtors  
11 and the insureds.

12 In Republic Airways, which Your Honor presided  
13 over, the debtor made a motion for stay relief to permit the  
14 insured directors and officers to seek reimbursement under  
15 the policies. That motion was not contested. And Your  
16 Honor entered an order granting that relief in that case.

17 As a threshold matter, we believe the committee is  
18 not permitted to oppose the motion. The policy itself  
19 includes a waiver of the automatic stay by the debtors and  
20 it restricts the debtors from opposing any request for stay  
21 relief. The debtors abided by that provision. They did not  
22 oppose our request.

23 The committee, as a representative of the estates,  
24 is likewise bound to that provision and it cannot end run  
25 around that limitation. If it wants to avail the estate of



1 the benefits of the policy, as a representative of the  
2 estate, it must accept the limitations as well. It can't  
3 have its cake and eat it too.

4 On the merits, we don't think the stay is  
5 applicable here because the estate's interest in the  
6 proceeds are specifically and expressly contractually  
7 subordinate to the insurance priority rights under the  
8 policy. Based on that, and through the lens as to how  
9 courts evaluate whether the proceeds should be considered  
10 property of the estate, the requested relief does not  
11 otherwise impair the estate's rights as the estate is only  
12 entitled to be paid if there are excess proceeds after  
13 paying the claims of the insureds under Side A.

14 To the extent the stay applies, there is ample  
15 cause for stay relief. In its objection, the committee does  
16 not disguise its ambition. It's expressed goal in enforcing  
17 the stay is to enable the estates to exhaust the policy  
18 limits and prevent the insureds from ever enforcing their  
19 rights under the policies. For one, this is plainly an  
20 improper use of the automatic stay. The automatic stay does  
21 not expand and cannot be used to expand the debtor's  
22 property interests. And that is exactly what the committee  
23 is seeking to do here.

24 The debtor's property interests and the policy  
25 proceeds are contractually subordinated in right of payment

1 to the D&O's rights. The committee seeks to use the  
2 automatic stay to enhance that property right and eliminate  
3 the subordination through the proverbial race to the  
4 proceeds, which the insureds will necessarily lose if the  
5 stay is not lifted.

6 Second, and of critical importance, the committee  
7 is not offering to provide any adequate protection to the  
8 insured of its own property interest in the policy proceeds.  
9 Indisputably, the insured's interests would not be  
10 adequately protected if the committee and the estates are  
11 allowed to drain the policy proceeds while the automatic  
12 stay is in place. This utter lack of protection, of  
13 adequate protection is in and of itself ample cause for  
14 relief and by the very terms of the statute.

15 The significant harm to the insured is also self-  
16 evident. The insured has incurred legal expenses and will  
17 continue to incur expenses as the governmental  
18 investigations continue and he continues to cooperate with  
19 the debtors. The company has turned down his request for  
20 indemnification. The policies were clearly intended and  
21 designed to provide for payment of these very claims and the  
22 insured and the other directors and officers relied on these  
23 policies.

24 Continuing to stay and preventing such payment  
25 imposes a financial hardship on the insured and harms him.

1 To make matters worse, if the committee has its way, the  
2 policy proceeds will be used exclusively for the estates and  
3 the insured will not be able to recover anything under the  
4 policies. As such, is not just an issue of timing but will  
5 cause permanent irreparable harm.

6 In contrast, the estates are not harmed. Either  
7 the policy proceeds are more than sufficient to cover both  
8 the insured and the estate's claims and everyone can be paid  
9 in full. In that circumstance, stay relief should be  
10 readily granted and shouldn't be controversial. If on the  
11 other hand, the policy proceeds are not sufficient to cover  
12 all claims, then the estate's interests stand behind the  
13 insured's in right of payment. In that respect, the  
14 estate's rights are not being prejudiced by the stay relief  
15 as their rights are effectively limited by the policy terms  
16 themselves. There's not an impact from the relief from the  
17 stay. It's the contract that limits that.

18 As harm, the committee points to the creditors'  
19 ability to recover under the policy on account of a future  
20 potential judgment against the directors and officers. In  
21 our papers, we cited the National Fish and Seafood decision  
22 which rejected this exact argument finding that the estates  
23 do not have a property right to control the apportionment of  
24 A side coverages between defense costs and a judgment.

25 I would also cite to Allied Digital Technologies,

1 306 B.R. 505, from the Bankruptcy District of Delaware 2004,  
2 which reached the same result, authorizing payment of  
3 defense costs over a trustee's objection who sought to  
4 preserve policy proceeds to satisfy his own claims against  
5 the target insured.

6 MF Global, too, supports this conclusion,  
7 recognizing that the contrary result would be inequitable to  
8 the insured. And that's at 469 B.R. at 196 to 97.

9 One final note on harm, the debtors may also be  
10 harmed here if stay relief is not granted because that  
11 result may very well lead to Mr. Moro being unable to  
12 cooperate with the debtors continuing requests for  
13 information and documents on a go-forward basis.

14 In conclusion, to the extent the stay applies,  
15 cause exists for stay relief, including as evidenced by the  
16 lack of adequate protection afforded to the insured, the  
17 harm the insured is facing, and the lack of harm to the  
18 estate. Thank you, Your Honor.

19 THE COURT: All right. Thank you very much. So I  
20 assume before you leave the virtual podium that we should  
21 address the question about the declaration. So I assume you  
22 want to move it into evidence?

23 MR. MINTZ: I'm prepared to do that, Your Honor.  
24 It wasn't clear to me under your rules whether today was  
25 intended to be an evidentiary hearing, but I am prepared to

1 move it into evidence.

2 THE COURT: All right. So let's see where we end  
3 up or if we're going to start cross-examining witnesses,  
4 we're going to do it here in court in person. But I'm not  
5 quite sure what the objection is. So what's the objection  
6 by the committee?

7 MR. ABELSON: Yes, Your Honor. Again, for the  
8 record, Phil Abelson White and Case on behalf of the  
9 committee. Your Honor, it's broadly, the objection is  
10 broadly addressed to the declaration itself, which is from a  
11 lawyer in which the lawyer testifies as to the client's  
12 situation, which seems both odd and getting to the second  
13 point, more specifically, just pure hearsay. If you look at  
14 in particular --

15 MR. MINTZ: So, all right, I mean I love a good  
16 hearsay discussion as much as the next person. But is any  
17 of this disputed? I mean we try to be practical here in  
18 terms of expending people's time and money on evidentiary  
19 hearings. And if none of the facts here are in dispute, I  
20 could take a proffer and then I would ask people if they had  
21 a, you know, an issue with the facts here.

22 So I understand the hearsay objection, but I'm  
23 just not quite sure that at the end of the day, it's a  
24 meaningful discussion. So does anybody dispute, for  
25 example, that he's currently paying for these defense costs

1 out of pocket, and he's got a family of five, he's the sole  
2 source of income, and all these details about his own  
3 situation? So really, it's everything, I guess, from  
4 Paragraph 4 through Paragraph 13. So is there any dispute  
5 about these things or questions about these facts?

6 MR. ABELSON: Yes, Your Honor. I think there are  
7 questions. I mean, look, there are certain things we can,  
8 we can take and say, ok, well, just presume those are true.  
9 They don't really move the needle. But this, this whole  
10 question comes down to the equities, right? Whether the  
11 movant can establish that you should lift this day and treat  
12 Mr. Moro differently than every other creditor. We're going  
13 to talk about that when I get to my argument. And  
14 ultimately, that's going to come down to Mr. Moro's  
15 situation.

16 Frankly, I don't know that Mr. Moro's situation  
17 actually changes the analysis, but it's certainly the  
18 centerpiece of their motion because if Mr. Moro is a  
19 billionaire, the 300,000 on an equal basis, doesn't move the  
20 needle. Your Honor, I presume you're not speaking to me.  
21 There you go.

22 THE COURT: Yeah, I know. There was an alarming  
23 message about being muted by the host and I have no idea  
24 what that means other than the fact that I wouldn't be able  
25 to talk to you. But happily that's -- that message is gone

1 and all as well. So I think we got to pump the brakes a  
2 little bit here. I'm not -- there's a, there's bit of the  
3 sky is falling aspect of the argument you're making, which  
4 is who knows what's going on with Mr. Moro? Well, I imagine  
5 people do know. It's not unknowable. And so, I'm, I'm not  
6 -- that's just not a very productive way to look at this  
7 particular situation and to say he's a creditor, well he's a  
8 creditor who has, as we look at any creditor, has  
9 circumstances and circumstances dictate whether creditors  
10 are priority creditors, administrative creditors, or  
11 somebody who has a D&O policy for which he's the insured.  
12 And so we look at those circumstances. So I'm not, that's  
13 not really going to get me anywhere. So do you have a -- so  
14 is there something in the paragraphs here that you  
15 understand to be in dispute? I mean particularly as to  
16 whether he's getting coverage, whether he's expending money  
17 and has had to pay it out of his own pocket, which is what  
18 Paragraph 8 says, which I think is really the relevant  
19 thing. I don't know that he's somehow ineligible to be an  
20 insured if he's a billionaire. I don't think anybody thinks  
21 he is a billionaire, but I don't know that that's neither  
22 here nor there for purposes of the insurance policy.

23 MR. ABELSON: Your Honor, respectfully, that's not  
24 really the question. The question is, should you lift the  
25 stay? Whether you should have access to the policy --

1 THE COURT: Well, no, but I have to figure out  
2 what everybody's rights are under the policy first. Right?  
3 So and that's what this declaration is about.

4 MR. ABELSON: Fair enough, Your Honor. And that  
5 goes to whether this declaration should be admitted at all.  
6 And what I'm saying is it's --

7 THE COURT: Counsel, we're not going to get very  
8 far with this. We could spend more money on some of these  
9 debates then frankly, we'll just burn estate cash talking  
10 about some of these things for both the committee and the  
11 debtors. I'm not, I'm not going to deal with platitudes and  
12 sort of general statements by the committee about  
13 generalized equities. The declaration I take to be about  
14 his status is insured under the policy, that he is expending  
15 money to respond to requests that deal with the company.  
16 And therefore, he has a basis to draw on the insurance  
17 policy. So that's what I take to be the relevant facts for  
18 purposes of today. Are any of those disputed?

19 MR. ABELSON: Those facts that you just listed are  
20 not disputed, Your Honor, but that's not what Paragraphs 8  
21 and 9 say at least in full.

22 THE COURT: Well, that's what I care about for the  
23 moment. So the facts about his coverage and that he's  
24 spending money is what I care about. So, all right. But  
25 again, you know, my thought is that I would think very, very



1 long and hard about whether you want to start to get into  
2 his personal situation in terms of an evidentiary matter  
3 when you could pick up the phone and ask Mr. Mintz some  
4 questions about it. It doesn't seem -- it seems to be like  
5 we're burning money unnecessarily on something like that  
6 when people can talk to each other. So if you want to have  
7 an evidentiary hearing on that, I'm going to be very mindful  
8 of the costs of such an endeavor for anything that can be  
9 solved by a simple phone call between counsels. So, all  
10 right. I'm not, I'm not going to go any further with this  
11 particular thing right now. I see why Mr. Mintz maybe  
12 didn't move it into evidence, because it's a bit of a  
13 hornet's nest. So the question is whether it makes sense to  
14 hear from the committee now on its legal argument or whether  
15 it makes sense to hear from other, other folks? I guess my  
16 thought is since I'm already talked to Mr. Abelson, now, I'm  
17 inclined to just go ahead and, and segue right to the  
18 merits. So Mr. Abelson, unless you have a different  
19 suggestion, why don't you, why don't you address the merits?

20 MR. ABELSON: Yes, Your Honor. To be clear, Your  
21 Honor, I was not suggesting that we hold an evidentiary  
22 hearing.

23 THE COURT: Well you kind of were, I mean, whether  
24 you, whether you were devoutly, you know, committed to that  
25 result is another question. But when you have an objection

1 to the admissibility of evidence, you're sort of asking for  
2 an evident or hearing, that's kind of the way that goes at  
3 least as far as trial lawyers.

4 MR. ABELSON: Well, Your Honor, I had a different  
5 suggestion.

6 THE COURT: Let's move on. Let's just, let's skip  
7 to the merit of this. So he's an insured under the policy,  
8 right? And as I understand New York law, the insurance  
9 company has a duty of treating everybody who's an insured  
10 under a policy appropriately. And if there are multiple  
11 folks who are under a policy, then you sort of -- I recently  
12 had this come up two weeks ago, then sometimes an insurance  
13 company will insist on siloing out different proceeds to  
14 make them available for people that have defense costs. But  
15 here I think -- so that would seem to set the floor for  
16 this. But what Mr. Mintz is saying is that the policy  
17 itself has a priority clause and it says that the insureds,  
18 the individual insureds, the Side A come, come first. And  
19 so that seems to be the crux of what he's saying that we  
20 don't have to sort out. And therefore, I don't have the  
21 active participation of the insurance company here I suspect  
22 for that reason, that they're not coming in concerned that  
23 paying out money to one insured will somehow compromise them  
24 or lead to them being sued in another context because of  
25 this priority provision. So what's your view about all of

1 that?

2 MR. ABELSON: Yeah. Your Honor, I would contest  
3 what Mr. Mintz said because I think the premise is wrong.  
4 What we're trying to do is preserve the asset like we do  
5 with assets.

6 THE COURT: No, no, I have a very specific  
7 question about the policy and the priorities under the  
8 policy. And I need you to answer to that question.

9 MR. ABELSON: The policy says --

10 THE COURT: I don't have a magic equity wand. I  
11 look at what people's rights are under applicable law, which  
12 here includes this insurance policy.

13 MR. ABELSON: Right. The policy says what it  
14 says, Your Honor. And there is a priority provision that  
15 says that if you get to the point where you're going to  
16 exhaust the policy, the insurer will then pay Side A claims  
17 first.

18 THE COURT: All right. So if there are Side A  
19 claims that need to be paid then, how does it make any  
20 logical sense then to object to paying those, if those would  
21 come before anything else that the estate would get?

22 MR. ABELSON: Because, Your Honor, Mr. Moro is not  
23 the only party who can make claim to that policy. There are  
24 other for -- there are former officers and directors. There  
25 are the current officers and directors. This is one policy.

1 This is all we have. So if you --

2 THE COURT: But isn't that the insurance company's  
3 problem in the sense of once it's exhausted for any  
4 individual insureds in Side A, you know, there's that  
5 question about is it a loss, the first incurred loss that  
6 sort of pay as you go or that you need to set aside money?  
7 But it doesn't seem to -- that doesn't seem to inure to the  
8 benefit of the estate, does it? I mean, how does that, how  
9 does that work?

10 MR. ABELSON: Well, again, let me start, let me  
11 take a step back because the estate has actually filed  
12 claims under the policy already. They're just being held  
13 because they haven't hit the retention amount, which is a  
14 million dollars.

15 THE COURT: But wouldn't those have to, by  
16 definition, have to come after Mr. Moro's request for  
17 reimbursement given the way the priority works in the  
18 policy?

19 MR. ABELSON: Not until you hit the point at which  
20 the policy is exhausted, Your Honor. So but, look, I would  
21 go back even further and say --

22 THE COURT: So what you want is that everybody has  
23 enough bills that exhaust the policy and then to pay Mr.  
24 Moro first?

25 MR. ABELSON: No, that's not exactly what we want.

1 What we would like is for the estate to apply as it does to  
2 make sure that before assets are dissipated, that we make  
3 sure that they are equitably distributed and that includes  
4 to the current D&Os. Once this policy is exhausted, Your  
5 Honor, there is no D&O policy for this estate. Now, the  
6 debtor can't -- the debtor, for whatever reason --

7 THE COURT: What I'm trying to figure out is how  
8 Mr. Moro wouldn't end up getting covered one way or the  
9 other under the operation of this policy? It would seem to  
10 be a violation of the policy for the estate to get payment  
11 out of it and Mr. Moro not to get paid out of it, that that  
12 would seem to violate the priority provision.

13 MR. ABELSON: Well, again, only if we've  
14 exhausted. That's actually the point, Your Honor. I'm not  
15 saying he can never access it. What I'm saying is at the  
16 moment, lifting the stay to allow only Mr. Moro -- and let  
17 me get to the point of what the debtor said, which I think  
18 is just equally as bad -- but to allow Mr. Moro to go and  
19 access and potentially exhaust the policy while everybody  
20 else is waiting and we're waiting to see what happens in  
21 this case -- this case is very complicated. There are,  
22 there are admittedly lots of investigations, Mr. Moro is  
23 right or Mr. Mintz was right. There are investigations. We  
24 are doing one ourselves before we decide --

25 THE COURT: But I don't normally see this in this

1 context. I don't have people come in and say, Judge,  
2 everything has to be exhausted for anybody to come in and  
3 seek to have themselves covered under the policy. That's  
4 not, that's not my experience of how this works. I've seen  
5 pay as you go. A couple of weeks ago, as I said, I saw an  
6 instance where a Chapter 11 trustee said, we think we're  
7 settling with these folks. They're entitled to money under  
8 the policy. That's what's going to fund the settlement. We  
9 think the insurance company can just pay all the policy over  
10 to us. The insurance company says we have an equal duty to  
11 all the insureds and they're not willing to do that. And so  
12 we're going to apportion it among the insureds, the folks  
13 who are entitled to coverage under the policy. So I've seen  
14 that. But that didn't purport to say you have to wait till  
15 everything's exhausted to sort things out. The insurance  
16 company was essentially insisting on something to say, we  
17 don't want to get sued at the end of the day. But here, but  
18 that case didn't have a priority provision. So with the  
19 priority provision, I'm having trouble imagining how Mr.  
20 Moro having submitted -- well who wants to submit requests  
21 and is entitled to submit requests, would end up behind  
22 everybody else, would end up behind the estate. And I think  
23 the committee probably only has an interest in this to the  
24 extent we're talking about assets of the estate and them  
25 insuring to the benefit of the estate. I know you've invoked

1 other insureds, but that's not really who you're here about.  
2 You're here about -- and I think there was a mention about  
3 the committee and the policies being available for any  
4 claims that the committee might have. So I just have  
5 trouble imagining a circumstance where Mr. Moro ends up out  
6 in the cold, given the way the policy works, the fact that  
7 he already has incurred expenses. So I mean -- because I  
8 don't, I don't see how it would be appropriate to game the  
9 system in terms of the automatic stay so that somehow the  
10 things that he incurs now somehow get put at the back of the  
11 line later. So even if we haven't technically exhausted the  
12 coverage for that to be triggered, that seems a foregone  
13 conclusion. So am I missing something about how this is  
14 actually going to work?

15 MR. ABELSON: Well a couple of things, Your Honor.  
16 One is it is actually a pay as you go. It's only when you  
17 get to the point where there are competing claims and it  
18 exceeds the policy that then they would say pay Side A  
19 versus Side B or C. So the debtors claims are in line, they  
20 are going, you know, they are in line to be paid. And so  
21 again, we just want to preserve the asset for the debtors  
22 because we don't know where this is going to go.

23 THE COURT: But if the debtors are entitled to be  
24 paid, wouldn't Mr. Moro be entitled to be paid? I mean  
25 wouldn't the insurance company be put in an inappropriate

1 position under applicable insurance law in terms of  
2 violating their duty to treat insureds appropriately under  
3 the policy?

4 MR. ABELSON: Well, yes, although what is likely  
5 to happen now is that we're going to have -- and I don't, I  
6 mean, I wouldn't blame them -- the other former D&Os, the  
7 current D&Os file claims to try to get themselves in the  
8 line. The whole point of the stay is to make sure that  
9 estate assets are preserved, so we can figure out how they  
10 can be equitably distributed, and distributed according to  
11 the policy because ultimately, we're not distributing them.  
12 It's not the estate, it's the insurer.

13 THE COURT: But doesn't that argue for language in  
14 the order about essentially that the insurance companies  
15 should -- I mean, they're the folks who are sort of on the  
16 hook, aren't they, right, if they pay out the proceeds  
17 incorrectly and they favor one insured over another, another  
18 officer? But even if I want to get into that, wouldn't we,  
19 as we did, as they did a couple of weeks ago, then put in  
20 provisions that talk about them, their obligation to treat  
21 insureds equally? I mean you could set aside money. I  
22 don't know exactly how many insureds there are. But I don't  
23 know that it counsels for your result of saying we're  
24 keeping this all for the estate and nobody else is entitled  
25 to anything. That doesn't seem to be consistent with the



1 whole reason behind the existence of this policy.

2 MR. ABELSON: No, I understand, Your Honor. I was  
3 -- to the extent that I was suggested, that's not what I'm  
4 arguing. What I'm arguing is that the timing is such that  
5 it doesn't make sense to allow the door to be open for  
6 people to start to dissipate this policy because once this  
7 policy is gone, that is it, that's our D&O for the debtor.

8 THE COURT: But that's the way it works, right? I  
9 mean I'm having trouble understanding -- also as the  
10 committee, you would care about preserving assets of the  
11 estate. But if it's gone, because all of these folks who  
12 are entitled to coverages, individual insureds have made  
13 claims, then that's what happens. So that's not a, that's  
14 not something that the committee really has any skin in that  
15 game if that's what the result is.

16 MR. ABELSON: But that's only, Your Honor, if you  
17 lift the stay. That's the point. The stay does protect and  
18 we can talk about whether it applies --

19 THE COURT: I think you're elevating form over  
20 substance here, right? I mean sometimes the policies are  
21 written in ways that you have trouble figuring out what --  
22 how to treat various parties under it vis-a-vis the  
23 bankruptcy. But this priority provision seems to make it  
24 very clear that if individual insureds under Side A have  
25 claims, they have claims. And those that -- there's not a

1 circumstance, or there shouldn't be a circumstance where the  
2 policy gets exhausted and those folks' claims don't get paid  
3 and somehow the debtors, as the estate, as the entity  
4 insured or -- I'm sorry, I'm getting the -- the company  
5 insured ends up making out better than they do. That would  
6 seem to be inconsistent with the policy. That's the way I  
7 read your papers is that this should be preserved for the  
8 estate, meaning the debtors, as the company insured to be  
9 able to use as opposed to these individual insureds. And I  
10 have trouble reaching that conclusion based on what I know  
11 of the policies, policy.

12 MR. ABELSON: Yeah, fair enough, Your Honor. I  
13 mean, look, we looked at this situation and said, does it  
14 make sense right now where we are in the case -- and it's  
15 not a large policy as you probably noted -- to allow a  
16 former CEO, who's part of the investigation, to go and start  
17 to take assets out of the estate and leave the estate  
18 exposed without potentially D&O insurance. That was the way  
19 we looked at it. I mean, again, my point is this isn't  
20 forever. It's for now to figure out the timing. What's  
21 going to happen? Who might make claims at it? Does the  
22 estate have claims? Might there be another exclusion?

23 THE COURT: But again, you keep getting back to  
24 the estate and you keep getting back to trying to pay any  
25 claims that the committee contemplates bringing against

1 folks and I don't, that's still the company insured and  
2 given the way the insurance policy is written, your desired  
3 outcome seems to not be in the cards, for lack of a more  
4 precisely parsed legal way of saying that. I just have  
5 trouble seeing that to be the end game here. So I  
6 certainly, if there are guard rails about how to treat this  
7 insured individual versus other insured individuals,  
8 frankly, I think that that's really something the insurance  
9 company would have a stake in as to how that goes. But at a  
10 certain point, they would probably say, Judge, you know,  
11 keep out of it. We have an insurance policy. This is what  
12 we do for a living. We know who to pay and how to pay them  
13 based on the policy. And if the company makes claims,  
14 they'll be processed consistent -- I mean I can see the  
15 point of saying anybody, if you're going to allow this  
16 insured to make a claim, this individual insured, then  
17 anybody else who's on the policy should be able to make a  
18 claim. And if I'm understanding the dialogue, it sounds  
19 like that was something that was suggested by the debtors  
20 and that the movant doesn't have a problem with. And that  
21 that essentially gives everybody equal treatment and allows  
22 the insurance company to do what it would do. And if  
23 there's money left, then there's money left. But it doesn't  
24 sound like that's going to be how it ends up. So I just  
25 have - so I could see if you flip the facts here and the

1 individual insureds came after the company insured, and you  
2 said they want to lift the stay, but we're first in -- the  
3 debtors are first in line, Judge, these folks will end up  
4 using up the available insurance funds and they aren't first  
5 in line. And we can end up, the debtor can end up in a  
6 worse situation. I would understand that concern because it  
7 would essentially could effectively mean that whatever  
8 priority the debtor had, as the company insured being first  
9 in line, would effectively be erased. But I have trouble  
10 seeing the problem the other way around. Again I don't  
11 profess to be an insurance expert, but we do end up dealing  
12 with these things in bankruptcy court. And again, just the  
13 other day, I had one of these and the insurance company was,  
14 was the party coming in to sort of craft the terms of how  
15 they wanted the stay relief to look so that they did not  
16 feel like they would be legally compromised in any way in  
17 taking actions under the policy.

18 So what else do you want to tell me, counsel? I  
19 appreciate the back and forth discussion and I'm sure I've  
20 done violence to what's a very nice presentation. So sorry  
21 about that. But what else do you like to tell me?

22 MR. ABELSON: Yeah, I mean, Your Honor, I  
23 previewed and you seemed to reject what was going to be the  
24 thrust of the argument, which essentially is that this is an  
25 estate asset. The stay applies. And like all assets of the

1 estate where the stay applies, you don't lift it lightly.  
2 And there is a burden. And the burden is one where you look  
3 to see -- and you look at the Sonnax factors and the one  
4 that seems most appropriate here is the balance, which is  
5 really just saying where do the equities lie? And so I  
6 wasn't referencing equity in terms of equitable relief. I  
7 was saying, Your Honor, the test is really where do the  
8 equities lie, whether the stay should be lifted. And, you  
9 know, frankly, it's a little incongruous to me that the  
10 former CEO of a company that is under a number of  
11 investigations, is able to access the policy when 340,000  
12 unsecured creditors are sitting and have to wait to access  
13 their dollars and their crypto and all the stuff they're  
14 waiting for. And I'm sure within those 340,000, we could  
15 find plenty who could talk about financial hardship.

16 THE COURT: I know, but my concern with that is  
17 that seems to elevate the optics of this above the actual  
18 law and parsing through what we have. These are problems  
19 that come up in cases. We deal with them as they come up.  
20 We're not making value judgments about the moral worth of  
21 anybody or anybody's claims. We are just determining what  
22 makes sense given, given the law. And so let me -- I do  
23 want to hear from debtors because I haven't done that yet.  
24 So let me ask you, Mr. Abelson, if there are any other  
25 points that you wanted to make before I do that?

1 MR. ABELSON: No, Your Honor. I think that's  
2 fine. Thank you.

3 THE COURT: All right. So let me hear from the  
4 debtors.

5 MR. BAREFOOT: Good afternoon, Your Honor. For  
6 the record, Luke Barefoot for the debtors. Your Honor, as  
7 we set forth in our papers, we don't take a position --

8 THE COURT: All right, Mr. Barefoot, you're,  
9 you're very choppy at the moment. Looking at the video and  
10 hearing the audio, you might just have a poor connection.  
11 So if you want to hop on a phone line, as long as we can  
12 hear you, that's fine.

13 MR. BAREFOOT: Is this any better if I move a  
14 little closer?

15 THE COURT: Yeah, it is. It's vagaries of what,  
16 what works from a technology standpoint, and however you can  
17 make it work, God bless you. All right. Go ahead. We'll  
18 see if we can make it work this way.

19 MR. BAREFOOT: Thank you. So the debtors, as we  
20 set forth in our papers, don't take a position on whether  
21 Mr. Moro has carried his burden to lift this stay or  
22 otherwise, whether the relief should be granted. There are  
23 just a few points that I wanted to address.

24 First off, I did want to -- for the avoidance of  
25 any doubt on --

1 THE COURT: All right. Mr. Barefoot, you are  
2 breaking up. There is a number to call on Zoom, the Zoom  
3 platform. So if I were you, I would just hop off the video  
4 and just call that number and I'm happy to wait.

5 MR. BAREFOOT: I apologize, Your Honor. And I'll  
6 do that.

7 THE COURT: So, the apology is rejected. We never  
8 all quite know how these things happen and when they do and  
9 when they don't. No worries, just hop. I won't talk  
10 substance while he's gone, but I will say I did have a  
11 daughter whose room I ended up using during the beginning  
12 days of the pandemic for hearings. And she had always  
13 complained that the internet was terrible in her room. And  
14 her mother and I shrugged as most parents would like, oh,  
15 it's terrible. You can't get on the internet in your room.  
16 What a pity. And we did nothing. And then when I was using  
17 the room, I said, you know, she's really right. It is  
18 really terrible. So I fixed it and she came home. She was  
19 suitably outraged. But anyhow, it's hard to know how one of  
20 these things work, why they work and why they don't. So are  
21 you all back in the offices in substantial part or some  
22 part? How's that been working for folks?

23 MR. MINTZ: We're back in most days. It seems  
24 like there's probably half or so of people that actually do  
25 it.

1 MR. BAREFOOT: Your Honor, Luke Barefoot from  
2 Cleary Gottlieb. I've rejoined via audio. Can you hear me  
3 all right?

4 THE COURT: Yes, I can hear you just fine. And  
5 we've been talking about the internet and whether people are  
6 coming to work and technology problems, so nothing of  
7 substance. So we can pick up where we left off. So you  
8 said you had a couple of points you wanted to make, so take  
9 it away.

10 MR. BAREFOOT: Yes, thank you very much, Your  
11 Honor. As we set forth in our papers, we don't take a  
12 position on whether Mr. Moro has carried his burden to lift  
13 the stay or otherwise whether relief should be granted. I  
14 did want to note for the avoidance of a misimpression on the  
15 record, our disagreement with Mr. Mintz's argument that the  
16 committee is some now acting here as a representative of the  
17 debtors. This is not a case where there's been derivative  
18 standing granted or any similar circumstances. So the  
19 committee, in taking its position, is not speaking for or  
20 acting as a representative of the debtors as Mr. Mintz had  
21 suggested.

22 Beyond that, Your Honor, the only points that we  
23 wanted to make are the ones set out in our papers, which is  
24 that if the Court is inclined to grant the motion, the  
25 debtors would observe that the current scope of the proposed



1 relief in the motion is in equal parts inequitable and  
2 inefficient.

3 First, there are many other former directors and  
4 officers in Mr. Moro's position and it would be inequitable  
5 at best to lift the stay as to him to allow him to make  
6 claims and draw down the policy while preserving the stay  
7 for many other similarly situated directors or officers.

8 Second, while we're not clear on why the original  
9 motion only referenced the primary policy, the argument to  
10 the extent the Court finds that they have merit, would apply  
11 with equal force to the excess policies. And so in the  
12 interest of judicial economy, it would make sense to include  
13 in the scope of any order the excess policies as well.

14 THE COURT: All right. So let me ask the debtor,  
15 on behalf of the debtors, this, your take for what I would  
16 loosely say is sort of the thrust of the committee's  
17 objections is that somehow the estate will end up in a worse  
18 place here. I've been grappling with understanding how that  
19 could be given the way the policies operate and the language  
20 quoted by Mr. Mintz. Am I -- from the debtor's point of  
21 view, am I, am I missing something? Is there some concern  
22 that somehow the debtors, in terms of the property of the  
23 estate, will miss out on something by allowing individuals -  
24 - individual insureds to draw on the policy?

25 MR. BAREFOOT: Your Honor. First, I do want to be

1 mindful to the extent it would ever be found enforceable,  
2 mindful of the provisions and the policies that purport to  
3 prohibit the debtors from taking a position with respect to  
4 an automatic stay motion. And the last thing I would want  
5 is to somehow give an insured an argument that --

6 THE COURT: No, no. That's fair. I don't know if  
7 Mr. Mintz has an objection to you answering that question.  
8 I'm just trying to figure out the practicalities of drawing  
9 on the policy. I'm not asking you to take a position on the  
10 motion, the relief requested, but just as a practicality,  
11 what it means to lift the stay for purposes of what's  
12 available for the debtor versus what it would mean to not  
13 lift the stay in terms of whether the debtor is somehow  
14 disadvantaged compared to the other folks who are insureds  
15 under the policy.

16 MR. BAREFOOT: I appreciate that clarification,  
17 Your Honor. I think in many, if not most, factual  
18 scenarios, the practical point that Your Honor made is  
19 correct. And in many, many scenarios, it may not  
20 necessarily be a difference. I think given that in this  
21 case, unlike in many other policies that we've all seen, the  
22 priority of payments provision is not absolute and only  
23 comes into effect when there are aggregate claims that  
24 threaten to exhaust the policy. There could be a scenario  
25 where if the stay remains in place as to individual

1 insureds, but obviously doesn't prevent the debtors from  
2 making claims under the policy, there is a window in which  
3 not lifting the stay could have the effect of prejudicing  
4 the estate. But I also take the point that Your Honor made  
5 that the policy was written that way for a reason.

6 THE COURT: All right. Yeah, I'm trying not to  
7 improve anybody's position by virtue of either denying this  
8 motion or granting this motion. I recognize that that can  
9 be a little more complicated than you might think.

10 So and again, I do take Mr. Abelson's comment  
11 that, you know, that these things kick in with exhaustion  
12 and exactly how that would work itself out is an open  
13 question. But, , all right. Anything else from the  
14 debtors?

15 MR. BAREFOOT: No, Your Honor.

16 THE COURT: All right. Thank you very much. So  
17 let me ask, I think the ad hoc group is also here. I don't  
18 know if they wish to be heard in connection with the motion.  
19 All right, I'm not hearing anything. Anyone else who wishes  
20 to be heard. So I think, I heard from the committee. I  
21 don't know if the movant wants to wrap things up in terms of  
22 any responses.

23 MR. MINTZ: Your Honor, the only thing, I'll just  
24 confirm, which I stated before, is we do not have any  
25 objection to the modifications that the debtor has proposed

1 and we would be prepared to modify the proposed form of  
2 order to reflect those two modifications.

3 THE COURT: All right. And I just, I want to be  
4 very clear. I know I have them in my stack of papers, but  
5 if you could just run the particulars by me of those two  
6 modifications just in light of our recent discussion?

7 MR. MINTZ: As I understand it, I think number one  
8 is that the relief that would be granted would extend to all  
9 current and former officers and directors. And number two,  
10 that the applicable relief would extend not only to the D&O  
11 policy, but the E&O policy, and the excess policies as well.

12 THE COURT: All right. All right. Anything else,  
13 Mr. Mintz?

14 MR. MINTZ: No, Your Honor.

15 THE COURT: All right. So I'll turn back to you,  
16 Mr. Abelson, on two fronts. One is if you had any reaction  
17 to those two proposed changes? And second, in light of the  
18 concerns you've raised, but also in light of the discussion  
19 we've had, is there any other thing that you might request  
20 in the order that essentially ensures that the parties are  
21 treated in a way consistent with the policy rights and so  
22 that there's no undue windfall to anyone and the insurance  
23 company can essentially handle these things the way,  
24 consistent with the way the policy is written? So as to the  
25 first, any addendum or changes or objection to the two

1 proposed amendments that the debtors have provided to Mr.  
2 Mintz?

3 MR. ABELSON: So as to that -- as to those  
4 changes, Your Honor, I was originally going to oppose those  
5 changes that were suggested by the debtors because I think  
6 it creates the same issue, but given Your Honor's ruling, I  
7 think Mr. Barefoot is correct that judicial efficiency would  
8 make sense to not have to force everybody to come in  
9 individually and ask to lift the stay. So if the idea is  
10 that people can draw on under the policy as insured, and  
11 then rather than have us do this many times and have them  
12 incur the cost, I think that's fine to just have, have it be  
13 blanket for all the insureds.

14 As to your second question, Your Honor, as to  
15 whether there are any changes to the order, I can't really  
16 think of any necessarily other than maybe just making sure  
17 that it's clear that Your Honor's order doesn't impact the  
18 actual terms of the policy, because it is a pay as you go.  
19 As claims become payable, they should be paid until  
20 exhaustion and only again, when there's competing claims at  
21 exhaustion, would you give priority to Side A. And that  
22 could again, because the debtors have submitted claims, that  
23 could mean that the debtors actually get some benefit from  
24 it.

25 MR. MINTZ: Yeah, I'll read you some language.

1 And maybe this addresses the point. There is a provision  
2 that says nothing in this order shall constitute a waiver,  
3 modification, or limitation of any of the terms or  
4 conditions of the D&N policy.

5 MR. ABELSON: That, that sounds fine from my  
6 perspective, Your Honor. I could add a few words but I  
7 don't know that they're needed.

8 THE COURT: Yeah, I think it would also then  
9 include the excess policy as well. Right?

10 MR. MINTZ: Right. That's right. There would  
11 have to be revisions throughout to change the references to  
12 the D&O policy to the policies and we'll have to define  
13 those.

14 THE COURT: All right. And just in terms of the  
15 first modification, as I understand it, the duty of good  
16 faith and fair dealing under New York case law requires that  
17 insurer protect the interest of its insureds and that the  
18 insurer is prevented from taking actions that prefer one  
19 insured over another. And so I would imagine -- now again,  
20 the order of a bankruptcy court that essentially lifts the  
21 stay for one party and not for another is an order of the  
22 court, then people can come in. But it does seem that  
23 that's an appropriate amendment for purposes of being  
24 consistent with New York law. And so if the insurance  
25 company was engaged, they might, they might actually suggest

1 that as I've seen suggested in other cases.

2 And again, I had an insurer take a position that,  
3 you know, even in a first come first served policy, that  
4 they want to make sure to not have a circumstance where they  
5 have a problem from the good faith and fair dealing  
6 standpoint. So, all right. Anything else from any other  
7 party?

8 So I'm going to overrule the objection for a  
9 couple of reasons. One is I do think the debtors have not  
10 objected, given the language of the policy, and I'm not sure  
11 how the committee, in a case like this, isn't bound by that  
12 same language.

13 Secondly, I do think, well, bankruptcy courts get  
14 these kinds of requests all the time. I don't think this  
15 strikes me as a particularly offensive request. It's a  
16 request because somebody's cooperating with investigations  
17 and those investigations relate to the debtor. And if  
18 somebody, if these folks didn't cooperate, then somebody  
19 else would have to. And so, I think there is some benefit  
20 to the estate for somebody to be in a position to respond.  
21 But being as it may, I think there are people who are in  
22 these circumstances, who are running up expenses, the  
23 debtor's (indiscernible) as well. And I understand that  
24 this priority provision is not absolute. Given the way it's  
25 written, I do have trouble imagining that if folks are

1 allowed to -- that if the automatic state is used in a  
2 particular way, we essentially can rewrite the policy so  
3 that folks who are entitled to have provision when push  
4 comes to shove and exhaustion, end up at the back of the  
5 line, which does seem to be inconsistent with the way the  
6 policy is drafted.

7 So it seems most equitable to allow the debtors  
8 and other folks in these circumstances to make claims and  
9 for the insurance company to process them consistent with  
10 the policy on a first come first serve basis with provisions  
11 to be triggered as appropriate, including the exhaustion  
12 provision until the, until the policy limits are exhausted.  
13 So that seems to be the appropriate result here. I do think  
14 the two changes proposed by the debtors are appropriate so  
15 that one insured is not favored over another. And the other  
16 folks that we're talking about are other individuals who  
17 would be indistinguishable for policy purposes from the  
18 movant. And I would expect that we would see quite a few  
19 motions quite quickly to do that. And it makes sense to  
20 address that problem now, which again, seems to be the fair  
21 and equitable way to handle it.

22 And I also agree that dealing with the excess  
23 policy as well as the primary policy at this point makes  
24 sense so that we can deal with this in one fell swoop. I do  
25 appreciate the committee's, you know, you're thinking about



1 if you don't lift the stay and preserving assets of the  
2 estate. And I think that under other circumstances, I think  
3 that argument might have more traction. I am concerned  
4 about rewriting a policy though as a practical effect of  
5 that in a way that I don't think that's what the automatic  
6 stay is intended to do. It's intended to recognize the  
7 legal rights that parties have that preexist the bankruptcy.  
8 And I think that the result reached today is most  
9 consistent with that. It's not perfect, but it seems to be  
10 the fairest that we can do under the circumstances.

11 So for all those reasons, I will grant the motion  
12 as that relief has been amended in our discussions here  
13 today and through the debtor's comments and overrule the  
14 objection. I certainly encourage the circulation of an  
15 order before it's submitted here as well as conveying in  
16 that email submission to my orders inbox whether all folks  
17 are on board with the order, even if I understand that the  
18 committee does not consent to this request, they objected to  
19 it, but in terms of the order, I just want to make sure that  
20 you've seen it and think it comports with our discussions  
21 here today and the ruling.

22 So, with that, that's my ruling and I appreciate  
23 everybody's arguments and the papers and your attendance  
24 here today, as well as persevering through technical issues.

25 MR. ABELSON: Yeah, apologies, Your Honor. Can I

1 -- and I'm not, I'm not questioning the ruling. I  
2 understood where Your Honor stands. But there was one thing  
3 that was said that I think needs to be clarified, which is  
4 the first point in your ruling, which was that the provision  
5 would bind the debtor and the committee, the provision that  
6 limited the ability of the debtor to object to lifting the  
7 stay. I would think that we want to add a qualifier in  
8 there for future cases that said if that is enforceable  
9 because if it's enforceable, I don't know why it's not in  
10 every contract that says when I go to lift the stay, you're  
11 not going to oppose it. And if you do, essentially --

12 THE COURT: Well, I'm not going to make an  
13 advisory ruling as to future cases. All I will say for  
14 purposes of clarifying remarks is that it's been cited as a  
15 basis for the debtors not filing an objection. The  
16 committee is acting as fiduciaries on behalf of creditors to  
17 the estate. And so to the extent that the committee is  
18 acting to preserve assets of the estate, much like the  
19 debtors, there's an argument to be made that that provision  
20 would also, might also bar it from opposing a lift stay  
21 motion. But frankly, I think there's other grounds based on  
22 the Sonnax factors -- the application of those factors is  
23 discussed in the papers -- that make this an appropriate  
24 request for relief from the automatic stay in any event.

25 MR. ABELSON: I'll let Mr. Barefoot speak to this,

1 Your Honor, but I think they did it out of abundance of  
2 caution. My, my concern, Your Honor, is I don't think they  
3 conceded the point that they're bound.

4 THE COURT: Well, I'm not asking you to concede  
5 it. It was, it was argued and it wasn't specifically  
6 opposed. So I'm not, I'm not here to reargue the motion at  
7 this point.

8 MR. BAREFOOT: Your Honor, Luke Barefoot from  
9 Cleary. Just very briefly, while we would take issue if we  
10 were forced to with the enforceability of this as to the  
11 debtors and their estate, I think perhaps what Mr. Abelson  
12 is concerned with is that if you find, which I don't think  
13 Your Honor needs to or has to, finds that the policy  
14 prohibition applies to the committee, there perhaps has been  
15 -- the existence of the objection could be raised as a  
16 coverage issue, which I don't think is anyone's intention.

17 MR. ABELSON: Well, that -- apologies. That, Your  
18 Honor and, and just bankruptcy policy if the provision in a  
19 contract says that the debtor can't object to --

20 THE COURT: No, I'm not -- I think I just said an  
21 argument can be made, which is an attempt to soften the  
22 blow. And so that will be my observation on that point for  
23 purposes of the particular facts in this case, dealing with  
24 this particular insurance policy.

25 MR. ABELSON: Fair enough.

1 THE COURT: It is not meant to be a general  
2 statement about how the committee's standing overlaps or  
3 doesn't overlap with the debtor's standing in raising any  
4 issues. The committee has its own statutory authority and  
5 concerns. And so I'm not trying to make some sort of broad  
6 statement on that. It was essentially a throwaway point in  
7 the papers, but one that I think was made in the sense of  
8 saying, if the debtors aren't opposing, we're not sure why  
9 the committee is. So I take it in that vein and so I'll  
10 make it as an observation rather than hold it.

11 MR. ABELSON: Fair enough. Thank you, Your Honor.

12 MR. MINTZ: Thank you, Your Honor.

13 THE COURT: All right. And so let me ask for  
14 purposes of proceeding for the committee, I'm happy to go  
15 through and make more specific Sonnax factor findings if  
16 that's helpful for you or necessary for purposes of any  
17 future proceedings. I don't like to leave my judicial  
18 colleagues shorted on the joys of applying the Sonnax  
19 factors in individual cases, but sometimes I don't do it in  
20 extensive detail so as to save you all from -- preserve 10  
21 or 15 minutes of your life to do other things. So I'll  
22 leave it to you, Mr. Abelson, whether you would like me to  
23 do that in this particular circumstance?

24 THE COURT: There is no need, Your Honor, and I  
25 appreciate your time. Thank you.

1 THE COURT: All right. All right. Thank you very  
2 much. All right with that, anything else from any other  
3 party to address you this afternoon? All right. Thank you  
4 very much for your time today. Be well and I'm sure I'll  
5 see you all in the not too distant future.

6 MR. ABELSON: Thank you, Your Honor.

7 MR. BAREFOOT: Thank you, Your Honor.

8 (Whereupon these proceedings were concluded at  
9 3:19 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

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